LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED.
NOV 3 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR APPELLANTS

MYRON MOSKOVITZ, Esquire
National Housing Law Project
Earl Warren Legal Institute
University of California
Berkeley, California 94720
Telephone: 415/642-1811

JOHN H. CLOUGH, Esquire
Legal Aid Service
Portland, Oregon
Mailing Address:
Hawaii Legal Services Project
201 Community Service Center
200 N. Vineyard Blvd.
Honolulu, Hawaii 96817
Telephone: 808/536-4302

Co-Counsel of Record for Appellants

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT:	
I. Appellee's "Statement of the Case" Is Misleading	2
II. The Constitution Requires that Tenants Be Permitted To Assert Defenses in the Eviction Action Itself	3
III. Cohen v. Beneficial Industrial Loan Corp. Does Not Support Appellee's Position	5
IV. Oregon's Double Rent Appeal Bond Requirement Denies Tenants Due Process of Law	6
V. Recent Authorities	7
CONCLUSION	9

IN THE

Supreme Court of the United States

No. 70-5045

DONALD and EDNA LINDSEY, and All Other Persons Similarly Situated,

Appellants,

v.

DOROTHEA M. NORMET, THE HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR APPELLANTS

INTRODUCTION

Most of the arguments raised in Appellee's brief are covered by the arguments and authorities in Appellants' opening brief. In this reply brief, appellants will respond to the major new arguments and authorities mentioned in Appellee's brief. In addition, we will indicate some recent authorities which support our opening brief.

ARGUMENT

I. APPELLEE'S "STATEMENT OF THE CASE" IS MISLEADING.

Appellee's "Statement of the Case" tends to create two impressions: (1) that this appeal is almost moot, since the case was dismissed as to all issues between the other plaintiffs and their respective defendants; and (2) that appellants are raising issues (such as retaliatory eviction) on appeal for the first time. Both notions are incorrect.[1]

As to the first, Appellee overlooks the fact that this case was approved by the district court as a class action. The district court defined the class as "all persons in the State of Oregon who are, have been, or may be affected by the operation of Oregon Revised Statute, Sections 105.105, *et seq.*" Appendix, P. 33; 72 *Moore v. Ogilvie*, 394 U.S. 814 (1969). *Cf. Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). Furthermore, the statement simply is not true since although the respective defendant landlords were dismissed through settlements, the named plaintiffs remained in the case to litigate their claims against the defendant Judges of the District Court of the State of Oregon. See caption of opinion and judgment. A. 72, 79 and Pre-Trial Order A. 46, 48, 49. Note particularly part "G" of the Pre-Trial Order A. 49-50.

---

[1] Appellees also went into an extensive digest of the facts. This was unnecessary since they were stipulated to in the lower court Pre-trial Order. A. 42-50. Furthermore the lower court did not feel this was necessary since "All material facts are stipulated. For the purposes of testing the constitutionality of O.R.S. 105.105, *et seq.*, it is not necessary to decide whether the tenants grievances are well founded. We will assume that one or more maybe." A. 73. An observation is in order on Appellee's recitation of the facts. Appellee would appear to be attempting to assert that a landlord-tenant relationship did not exist between the Lindseys and appellee, Normet. It was specifically held by the lower court that such a relationship did exist between the parties. A. 71. There has been no cross appeal filed to raise this as an issue in this appeal rendering discussion of those facts irrelevant. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

As to the second, two points should be noted. First, the issue of retaliation against tenants because of receipt of welfare benefits was raised below. Appendix, p. 49. It was also very much before the lower court as an obvious issue that would have been raised in the Lindsey's case were a trial to be held on the merits in the State courts. R. Pl. Ex. No. 14. Often the specific issue of retaliatory eviction for reporting code violations is obfuscated by the concurrent attempt to withhold rent as in the Lindsey's case and the case of Bonnie Colton. A. 45-46. Second, appellee fails to recognize that the issue presented in this appeal is not whether a particular defense (such as retaliatory eviction) should be *allowed*, but whether defenses such as these must be *heard* and accepted or rejected on their legal and factual merits. This was made clear at pages 27-28 of our opening brief. This important distinction was overlooked throughout Appellee's brief.[2]

II. THE CONSTITUTION REQUIRES THAT TENANTS BE PERMITTED TO ASSERT DEFENSES IN THE EVICTION ACTION ITSELF.

At several points in his brief, Appellee appears to argue that the Due Process and Equal Protection Clauses do not require the Oregon courts to hear defenses in FED actions, as the tenant may assert any "claims" he may have against his landlord in another action. See, e.g., Appellee's brief, pp. 7, 14. There are three answers to this.

First, Appellee cites no Oregon authorities allowing tenants relief of any sort for the types of grievances mentioned in Appellants' opening brief. Nor are we aware of any such authorities. No Oregon statutes or case law permit tenants to sue for damages where landlords refuse to comply with

---

[2]See e.g., Appellee's brief, p. 15: "The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution does not compel all state statutes to aid enforcement of housing codes." Appellants have made it clear that they are making no such claim.

housing codes or to keep a dwelling even minimally habitable or where landlords impose retaliatory evictions or rent increases to punish tenants for exercise of their lawful rights.[3]

Second—and more important—is the fact that even if such relief by way of damages were provided, this would not be an adequate substitute for the matter at issue in the FED action, the tenant's right to retain possession of his home. It is well established that land is unique, and that the right to possession or ownership of it cannot be easily satisfied with money damages. Walsh on Equity, § 59 (1930). More recently, our courts have recognized that the right of a tenant to retain possession of his home is constitutionally protected. See the authorities cited in Appellants' opening brief. pp. 19-20. In none of those cases was the tenant denied the right to assert his defense in the eviction action and relegated to a later damage action after the injury is suffered. As shown in our opening brief, the defenses which tenants wish to assert in the Oregon state courts have been found by courts in other jurisdictions to be quite relevant to the issue of possession. All we ask is that Oregon courts consider these defenses on their legal and factual merits in the FED action itself. If they are rejected because they are based upon unsound reasoning, invalid assumptions, or lack of proof, fine, but to refuse to even hear these defenses and thereupon deprive the tenant of his home violates the Constitution.

---

[3] Assuming, *arguendo*, the assertion of claims in other affirmative actions were allowed under Oregon law, it would present the hollowest of all remedies since, under the present state of the law, the landlord could evict the tenant in retaliation and the Oregon Courts could do nothing to prevent the use of the eviction procedure which automatically requires entry of judgment if the technicalities are correct. Therefore, by permitting this procedure to stand, the tenant stands stripped of any forum to vindicate whatever rights he may have. Such a situation is clearly unconstitutional. See *General Oil Co. v. Crain*, 209 U.S. 211 (1908). Futhermore a tenant has the option to either assert his right affirmatively or stand in a defensive posture. This right of election of alternative routes cannot be denied by the state. See *Poindexter v. Greenhow*, 114 U.S. 270 (1885).

It is for these reasons that *Bianchi v. Morales*, 262 U.S. 170 (1923), cited by Appellee in his brief at p. 14, is distinguishable. That case involved the validity of a Puerto Rico statute which provided a summary action for mortgage foreclosure in which the permissible defenses were limited. (Unlike the present case, the statute in *Bianchi* was challenged only on due process grounds. Apparently, no equal protection argument was made). In upholding the validity of the statute under the due process clause, the Court was careful to point out that Puerto Rico did allow a separate action to annul the mortgage, in which any defense to the mortgage could be asserted. Such an alternative is lacking in the present case.[4]

III. *COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP.* DOES NOT SUPPORT APPELLEE'S POSITION.

At page 7 of his brief, Appellee asserts that the procedure established in Oregon for resolving possession disputes between landlord and tenant "accomplishes the objective of the law in a reasonable manner," and therefore does not violate the Equal Protection clause. Cited in support of this proposition is *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Appellee again cites this case on page 21 to support his argument that "security requirements," such as Oregon's double rent appeal bond requirement, have been upheld by this Court. We contend that *Cohen* does

---

[4]In addition, it appears from reading *Bianchi* that the main or only challenge to the Puerto Rico statute was that it did not permit the mortgagor to assert in the foreclosure action claims of "ultimate right," i.e., that someone else's title was superior to that of the mortgagee. No such claim is made in the present case. We do not claim any right to challenge the landlord's title in a FED action. Also, it should be noted that since *Bianchi* was decided, this Court has rendered several decisions emphasizing the citizen's right under the due process clause to an adequate hearing before being deprived of a substantial right. See e.g., *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969); *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Bell v. Burson*, 402 U.S. 535 (1971).

not support Appellee's position, while it does support ours. *Cohen* involved the constitutionality of a New Jersey statute which required certain minority stockholders bringing derivative actions to post security for "the reasonable expenses, including counsel fees, which may be incurred" by the defendants. (*Id.* at 552.) The amount of the security was subject to increase or decrease during the litigation to conform the new information as to what costs were likely to be actually incurred. In upholding the constitutionality of this requirement, the Supreme Court stressed the fact that the statute was designed to insure that the amount of the security would be reasonably related to expenses likely to be actually incurred by the defendants. Obviously, the same cannot be said of the Oregon double rent appeal bond requirement. As we pointed out in our opening brief, at pages 40-41, there is no rational relationship between a need to compensate some landlords for waste and damages actually incurred and a practice of giving every landlord double rent (no more and no less), regardless of expenses incurred.

IV. OREGON'S DOUBLE RENT APPEAL BOND REQUIREMENT DENIES TENANTS DUE PROCESS OF LAW.

In our opening brief, we compared Oregon's appeal bond statute applicable to tenants, ORS § 105.160, with that generally applicable to other litigants, ORS § 19.040, in order to show that the former unncessarily imposes harsh restrictions not imposed by the latter. (See Appellants opening brief, pp. 38-42.) At page 21 of his brief, Appellee correctly points out that the landlord who brings his action in district court would not be protected by § 19.040, which applied only to appeals from the circuit court. Therefore, some statements on pages 40-41 of our opening brief, regarding how the landlord maybe already protected by § 19.040 for rent and damages accruing during the appeal, do not apply to the landlord who brings his action in district court pursuant to ORS § 46.060 rather than in circuit

court pursuant to Or. Const., Art. VIII, § 9. Appellee is also correct in stating (on pages 21-22) that were it not for § 105.160, the double rent appeal bond statute, the landlord defending an appeal from district court would be protected only by § 53.040, which would require that in order for the tenant to stay in possession during the appeal, he would have to post a bond for the judgment and costs, but not also for any rent or damages accruing during the appeal.

Nevertheless, we still contend that § 105.106 is constitutionally deficient, on both equal protection and due process grounds, for the reasons set out in our opening brief. The double rent bond requirement of § 105.160 is unreasonably harsh and not related to any legitimate legislative purpose. This is particularly true where the broad equity powers of the Circuit Court would permit the entry of protective orders to preserve the *status quo*. See Appellant's Brief at 61. If the Oregon legislature decides that Appellee's concerns about § 53.040 are valid and decides to impose a *reasonable* bond requirement, such as § 19.040, to protect landlords defending appeals from district court, so be it. We would see no constitutional objection to this. But this is not the present situation. The double rent bond requirement of § 105.160 is currently imposed on all tenants appealing from district court. It goes far beyond what is reasonably needed to protect the landlord's interests, and it should be struck down.

V. RECENT AUTHORITIES

Since we prepared our opening brief, we have discovered several recent authorities which support our arguments.

In the wake of *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969), have been several state court cases extending the principles enunciated in *Sniadach* to strike down prejudgment garnishment, attachment, and replevin statutes which did not provide for an adequate prior hearing. See *Randone v. Appellate Dept.*, 5 Cal.3d, ___ P.2d ___ (1971); *Blair v. Pitchess*, 5 Cal.3d 258, 486 P.2d 1242 (1971); *Jones Press*,

Inc. v. Motor Travel Service, Inc., 286 Minn. 205, 176 N.W. 2d 87 (1970); *McCallop v. Carberry*, 1 Cal.3d 903, 464 P.2d 122 (1970); *Larson v. Fetherston*, 44 Wis.2d 712, 172 N.W. 2d 70 (1969).

Federal courts have begun to accept constitutional challenges to state appeal bond requirements in eviction cases. See *Razos v. Drusina*, 440 F.2d 795 (5th Cir., 1971); *Hayes v. Fellowship Gardens, Inc.*, C.C.H. Pov. L. Rep. ¶ 13,745 (D.C. Ind., 1971).

Finally, while Appellee argues that a double rent appeal bond statute is essential to protect the landlord's interests, the Legislatures of Massachusetts and Georgia have recently decided that stringent appeal bond requirements are not necessary. Mass. Gen. Laws, Chapter 239, § 5, now provides that the courts may waive the appeal bond requirement if the tenant shows that the appeal is not frivolous and that he is not financially able to post the bond. Georgia Code Ann. § 61-306 now provides that the tenant may appeal without posting a bond so long as he pays his monthly rent into court as it comes due.

CONCLUSION

Appellee has not provided a convincing rebuttal to the arguments set out in Appellants' opening brief. The arguments presented by Appellants are meritorious, and the judgment should be reversed.

Respectfully submitted,

John H. Clough, Esquire
Legal Aid Service
Portland, Oregon
Mailing Address:
Hawaii Legal Services Project
201 Community Services Center
200 N. Vineyard Blvd.
Honolulu, Hawaii 96817
Telephone: 808/536-4302

Myron Moskovitz, Esquire
National Housing Law Project
Earl Warren Legal Institute
University of California
Berkeley, California 94720
Telephone: 415/642-1811

Co-Counsel of Record for Appellants